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UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

GERRON LINDSEY,	:	Docket No. Civ. Act. No. 05-164-SLR
Petitioner.		
v.	:	
STATE OF DELAWARE, ATTORNEY GENERAL, SUPERINTENDENT OF THE DEPARTMENT OF CORRECTIONS AND THE WARDEN DELAWARE CORRECTIONAL CENTER,	:	
Respondents.	:	

**MOTION TO EXTEND TIME TO FILE NOTICE OF APPEAL
UNDER FED. R. APP. 4(a)(5)(A)(ii)**

Petitioner Gerron Lindsey moves this Court to extend the time to file his Notice of Appeal under Fed. R. App. 4(a)(5)(A)(ii) based on the following:

STATEMENT OF FACTS

On March 24, 2006, the Court issued its opinion and entered an order, dismissing Gerron Lindsey's petition under 28 U.S.C. § 2254 as being time-barred. Also at that time, the Court declined to issue a Certificate of Appealability.

On Monday, April 24, 2006, mailed by overnight mail on Friday, April 21, 2006, under the erroneous impression that, because the Court had declined to issue a Certificate of Appealability, the only recourse was filing a motion to appeal with the United States Court of Appeals for the Third Circuit, counsel for Mr. Lindsey filed a motion to appeal with the Third Circuit. The motion included as exhibits copies of the petition (with exhibits), the State's opposition, Mr. Lindsey's reply, the Court's opinion and order. However, based upon that same erroneous impression, he did not file a Notice of Appeal. On the afternoon of Thursday, April 27, 2006, a clerk from the Third Circuit advised counsel's office that a Notice of Appeal was required.

Accordingly, Mr. Lindsey now moves to extend the time to allow him to file the attached Notice of Appeal.

ARGUMENT

Under Fed. R. App. 4(a)(1): “[i]n a civil case . . . , the notice of appeal required by Rule 3 must be filed within 30 days after the judgment or order appealed from is entered.” However, “[t]he district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) that party shows excusable neglect or good cause.” Fed. R. App. 4(a)(5)(A). *Torockio v. Chamberlain Manufacturing Co.*, 456 F.2d 1084 (3d Cir. 1972).

In this case, counsel misunderstood the requirement for a notice of appeal where the Court denied a Certificate of Appealability. In any event, there can be no prejudice to any party. Petitioner filed with the Third Circuit and served the motion to appeal (complete with all relevant documents) within the thirty day appeal period, and upon learning of the necessity for a notice of appeal three days after the appeal time, the petitioner immediately filed this motion.

We submit that this constitutes excusable neglect, and that good cause exists for extending the time for filing the notice of appeal.

CONCLUSION

Because the delay resulted from excusable neglect and there is no prejudice to any party, the Court should grant this motion and extend the time for filing the notice of appeal.

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